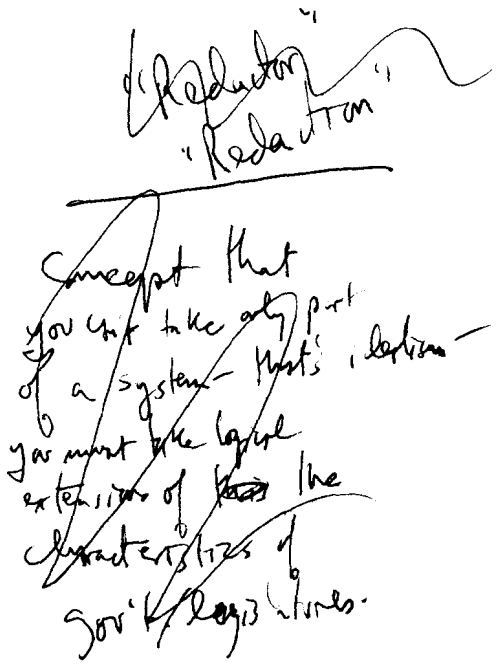

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CELEBRATING THE QUÉBEC CODIFICATION ACHIEVEMENT: A LOUISIANA PERSPECTIVE

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From the end of the Second World War, the world has been witnessing a frenzy of codification that has reached a feverish intensity without parallel in the history of the Civil Law.[1] As many as forty-seven new codifications around the world have been drafted or enacted or partly executed in the last fifty years. Some of these new codes are found in Western Europe (Greece, Portugal, Netherlands), some in Eastern Europe (Poland, Hungary, Yugoslavia then-East Germany, Soviet Union), others in the Middle East and Africa (Egypt, Algeria, Libya, Sudan, Syria, Ethiopia, Somalia, Iraq, Jordan), Latin America (Chile, Colombia, Bolivia, Venezuela, Guatemala), and finally here in North America (Québec, Puerto Rico, Louisiana). Both Québec and Louisiana are evidently taking part in a process that is literally sweeping the world, and the Québec/Louisiana recodification efforts are of worldwide significance and interest.

I think, however, that this bird's-eye view of the civil law world may create a false impression, the impression of a relentless and inevitable process which is smoothly occurring and easily accomplished, not fraught with pitfalls, false starts and criticism. For those in the field, the impression is far different.

I believe that no one who has ever been involved in or studied closely the process of law reform would be prone to underestimate the difficulty of recodification. This is a noble but Herculean task, and our admiration and respect for our Québec confréres must now reach the maximum as we see their new Civil Code being readied

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1. RODOLFO SACCO, LA CODIFICATION. FORME DÉPASSÉE DE LÉGISLATION?, RAPPORTS NATIONAUX ITALIENS, XI I.C.C.L. (Caracas 1982).

for the final stage of the journey—its enactment into law, possibly in 1992.

This represents a great intellectual, juristic, and political achievement. The Québec reform process began around 1962. It has required about thirty years to bear fruit. Indeed, it went through one complete drafting cycle which ended in 1977. The 1977 *projet*, however, apparently lost its political momentum and a second complete cycle of drafting was begun which has culminated in the 1991 *projet* soon to be put into force. This was obviously a long, demanding, frustrating process. In the wake of code revision, there are undoubtedly many rejected essays and unknown soldiers whose valuable efforts never come to life.[2]

If I compare the Louisiana experience in this regard, the progress has been tortuously slow and frustrating. We too started civil code revision in the 1960s and after about twenty-five years of hard work we have made substantial headway, yet merely forty percent of our Civil Code has been subjected to revision. Our process has been deliberately incremental and deliberately decentralized. At the present pace, Louisiana may not see the final stages until the second decade of the twenty-first century. This leaves much food for thought, comparison, and discussion of our two code revision processes, and much room for celebration of the Québec achievement. Should I say anything in the course of these remarks that seems too critical of law reform in either jurisdiction, I hope it will be clear that I personally have the greatest respect for the sung and unsung heroes of law reform and for the unselfishness of their work. Though at times I have ventured to be a critic, I basically share their aspirations, and I am sure I could do no better. In these short remarks I do not expect to say anything particularly new on this inexhaustible subject, so I may simply try to remind the audience where we are and where we want to go. I essentially

2. Perhaps someday someone shall propose that on some public thoroughfare in New Orleans or Montreal a large tomb dedicated to the Unknown Redactor should be built to honor all who have labored anonymously in the cause of Codification and, indeed, this proposal would probably pick up considerable political support if the critics of code revision would volunteer to build it (or to be buried within).

propose to ask three questions, or rather three clusters of questions, about the goals, the process, and the problems of recodification in the twentieth century.[3]

The first question is, do we really need to recodify our law at the present time? Considering the antiquity of our Codes, this may seem to be a makeweight issue. But old age is not the true issue. Recodification is really a question of political timing, of opportunity and consensus, and also a matter of objectives. A revered name in this State—C.J. Morrow—stated in 1958 that if recodification were not properly done, then it should not be attempted at all, for, if need be, the state could continue for another 150 years to be administered by the Civil Code of 1870. Thus, we should ask seriously, was there a pressing need to begin recodification, or was this laborious and costly effort simply an intellectual and cultural vanity on our part? Do we codify blindly because we civilians, like poor misguided lemmings swimming out to sea, are programmed to believe in recodification?

The second question is, why does this process take so long and why does it always seem so problematical and difficult? Is it in the nature of things or in the nature of the subject to take twenty-five to fifty years to recodify civil codes in the twentieth century? Fifty years! That's practically time enough to experience the Depression, the New Deal, the Second World War, the Cold War, the Fall of Communism, and ten different presidents of the Council of the Law Institute. The Revision could start in the Age of Radio and finish in the Age of Aquarius. Is it not paradoxical that those who have the speed of word processors and computer-assisted research at their command should labor far more slowly than their forebears who worked with pen and paper? When Livingston, Moreau-Lislet, and Derbigny were commissioned to draft a Civil Code for Louisiana in 1822, they produced their *projet* in less than two years, and it was enacted in 1825. Were they simply towering geniuses or reckless speed-demons? Justinian's law commissioners, headed by Tribonian, began their task of compiling the Corpus Juris Civilis in 548 A.D. They finished six years later. Napoléon Bonaparte's équipe, directed by Portalis, took barely two years.

3. I venture to ask these questions on two conditions—first, that in case these are the wrong questions to ask, that no one will think I meant to be critical or impertinent in addressing them; and second, that you do not expect me to have satisfactory answers to my own questions, for if that were expected I might have to pose easier questions.

The 1866 Québec Civil Code was entrusted in 1859 to a Codification Commission. They completed their work in seven years.[4] Eugene Huber, the father of the Swiss Civil Code, drafted that Code—by himself!—in three years.[5] These seminal codes were drafted and enacted in accordance with Lord Macbeth's prescription for murdering the king.[6] Of course, none of these examples involved recodification. But is there something about recodification which should be more difficult than the initial codification?

The third question I should like to raise is whether our twentieth century recodifications, at the end of the day, will conform to the criteria and requirements that define a code. Will the final product be a logical, coherent, and complete ensemble? Will we dare break with the past law and the jurisprudence which glosses it? And if we do not, will we have a code in the proper sense of the term? Will our efforts render a code which is the matrix and centerpiece of the legal system or will they render a beautifully systemized tip of an otherwise submerged iceberg of incoherent special legislation? Would it be proper to revise the code but not absorb the surrounding legislation engulfing the code?

I. THE NEED FOR RECODIFICATION ON THE EVE OF THE TWENTY-FIRST CENTURY

We cannot answer questions about the need for recodification without being clear about the basic objectives served by codification in general. Not every reason for codification remains a reason for recodification! For example, an original reason behind the codifications of 1808 and 1825 in Louisiana was to preserve our European law and culture. We sought codification, contrary to Governor Claiborne's wishes, as a bulwark against adoption of the Common Law and American assimilation. Protection from American culture, the English language and the Common Law, however, is no longer the critical issue in Louisiana, and, even if it were, certainly the present Code could continue to perform that prophylactic function whether or not we recodify. In 200 years we have

4. Louis Baudouin, *Les Apports du Code Civil du Québec*, *in* CANADIAN JURISPRUDENCE: THE CIVIL LAW AND THE COMMON LAW IN CANADA 71, 74-75 (Edward McWhinney ed., 1958).

5. DOMINIQUE MANAI, EUGEN HUBER, JURISCONSULTE CHARISMATIQUE (1990).

6. In Act I, scene 7 Macbeth says, "If it were done, when 'tis done, then 'twere well it were done quickly." WILLIAM SHAKESPEARE, MACBETH act 1, sc. 7.

evolved beyond those issues. Commercially, we are American; culturally and linguistically, we are American; and juridically, we are simply Louisiana—a law unto ourselves.

The story may be somewhat the same in Québec which undoubtedly adopted the Civil Code of Lower Canada of 1866 in response to a deep socio-cultural need to assure the survival of French law, language and culture. Codification then took on a vast symbolic value far beyond the scope of mere legal reform.[7] For many it was an aspect of Québec nationalism. The civil law, around which the Civil Code was a rampart, was considered, along with the French language and the Catholic religion, absolutely essential to the survival of the French-Canadian nation.[8]

These socio-cultural reasons remain constant objectives, but they have more historical than contemporary force in the context of recodification.

What enduring objectives underlie the relentless drive toward codification in the twentieth century? In my view, this may be explained in three words—certainty, justice, and modernity.

A. Certainty

An unchanging purpose of codification and recodification is to overcome an existing fragmentation of law and legal sources in order to create the conditions necessary for legal certainty. Confusion and fragmentation of sources could describe the state of the Roman law authorities preceding Justinian's Corpus Juris. It well describes the confused mixture of French customary law and Roman law sources prior to the Code Napoléon, and in Louisiana, highly uncertain application of Spanish and French authorities was a chief reason for adoption of the 1808 Code. Neither that Code, however, whose preamble spoke of the "confused state in which the civil laws . . . were plunged," nor the Code of 1825 completely clarified these sources.[9] The benefits of legal knowledge should not be reserved for the legal profession. Napoléon envisaged a code that was easily understood by the citizenry, a bookshelf guide in

7. Jean-Louis Baudouin, *Réflexions Sur le Processus de Recodification du Code Civil*, 30 C. DE D. 817-26 (1989).

8. Sylvio Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'intégrité du droit civil*, 32 MCGILL L.J. 559 (1987).

9. Parts of Spanish law were left in force and a Great Repealing Act (in 1828) was eventually a necessity.

the home. Thomas McCord, a member of the Québec Redaction Commission, stressed that a civil code would not only allow magistrates, advocates, and notaries to have a clear picture of the law, but it would also make the law accessible to the public of the province.[10]

The process of fragmentation, however, is never permanently arrested just because the laws have been initially codified. Fragmentation continues inexorably. Special legislation lying outside of the code piles up on all sides, as caselaw and jurisprudence create a thicker and thicker gloss upon the code texts. Special legislation and judicial interpretations—these are twin impulses of social adaptation that keep the system current even if the code continually ages. When a civil code conceived in the early nineteenth century reaches the year 2000, one must take stock of this vast and confusing output by legislatures and courts, this inflation of redundant and overlapping laws which is the true enemy of a scientific codification and the true nemesis of legal certainty. Today, in Louisiana, one confronts so many important subjects that are partly regulated by the Code and partly regulated by detailed special statutes. To name but a half-dozen well-known examples, there is the Louisiana Trust Code,[11] the Louisiana Mineral Code,[12] the Louisiana Products Liability Act,[13] the Louisiana Children's Code[14] (388 pages long), the Lease of Movables Act,[15] and the Louisiana Consumer Credit Law.[16] In Québec the statutes connected to the Code, and published as an annex to it, include the Adoption Act (1969), the Public Curatorship Acts (1971 and frequently amended), the Divorce Act (1970 and amendments), Bank Act (1970), Bills of Exchange Act (1970), Consumer Protection Act (1971), and the Automobile Insurance Act (1977).[17]

These special laws subtract from the primacy and supremacy of the code in the legal order; they create gray zones of uncertain application; and they detract from the generality of code rules.

10. LOUIS BAUDOUIN, *Les Apports du Code Civil du Québec*, *in* CANADIAN JURISPRUDENCE 72 (Edward McWhinney ed., 1958).
11. LA. REV. STAT. ANN. § 9:1721 (West 1991).
12. LA. REV. STAT. ANN. § 31:1 (West 1991).
13. LA. REV. STAT. ANN. § 9:2800.51 (West 1991).
14. 1991 La. Acts 235.
15. LA. REV. STAT. ANN. § 9:3301 (West 1991).
16. LA. REV. STAT. ANN. § 9:3510 (West 1991).
17. *See* CODE CIVIL QUÉBEC 1978-79 (Renaud et Baudouin eds.).

The growth of such laws has been phenomenal. In 1825, the amount of special legislation lying outside of Louisiana's Civil Code was minuscule. The Code truly began as the epicenter of the legal system. By 1852, the entire Revised Statutes of the State could still be encapsulated within a single book consisting of 598 pages. By 1870, that book was still only 775 pages in length. Today, the Revised Statutes are a fifty plus volume set. The so-called Civil Code ancillaries, a set of select statutes (which by no means exhausts the special legislation connected to the Civil Code) far exceeds the length of the Civil Code itself.

The problem is not local and specific to Louisiana and Québec. It is general and worldwide. Even Germany, a country with rigorous attitudes toward this tendency, now has more than twenty special statutes dealing with delictual liability based upon the idea of risk.[18] A German scholar writes that "[e]ven for lawyers it is getting difficult to have an overview of code subjects and for the average citizen, this is absolutely impossible."[19]

This description applies to Louisiana with even greater cogency, and it suggests the need to reestablish conditions of legal certainty for professionals and citizens. And this is one of the most important reasons why we have begun to recodify our laws.

B. Justice

There is a second reason why recodification must be attempted: justice and equality. Recodification helps to eliminate the unjustified unequal treatment of similar sets of facts. Unfounded substantive differentiation is a hazard of special legislation. It may come about because of historical and political coincidences, because of an isolated or narrow view of the problem at hand, or because of the influence of special interests. We see symptoms in the Code ancillaries: the maze of differing prescriptive periods applicable to rights and actions, the host of different formalities, disclosure obligations, and writing requirements. Franz Bydlinski writes that "[t]he principle of equal treatment has always been cited as a

18. A recent example is Germany's new Products Liability Law. *See* Werner Lorenz, *On the 'Calling' of Our Time For Special Legislation*, *in* QUESTIONS OF CIVIL LAW CODIFICATION 118, 119 (Attila Harmathy & Agnes Németh eds., 1990).
19. *Id.*

goal of codification."[20] His point is that the equal treatment of identical issues promotes justice in the sense of equality. He adds that "[a]nyone who . . . truly supports forsaking the idea of codification would also have to plead for abandoning equal justice and certainty of law as fundamental guiding legal goals."[21] If we examine the unruly mass of special legislation in Louisiana and Québec that needs to be absorbed and rationalized within the Civil Code structure, it must be apparent that we need recodification now more than at any time since the inception of our Codes. The longer we wait, the further our sources of law multiply like unruly weeds in a beautifully planned garden. Postponed reform in a codified system is the enemy of equality and justice in a codified system.

C. Modernity

The third reason supporting the revision of an aging code is the need for modernization. In a sense, some modernization occurs automatically as a result of special legislation and judicial caselaw being added to the code framework, but this is inadequate modernization if the anachronisms and outdated presuppositions of the original Code remain unchanged. The talented James J. Morrison, writing in 1937,[22] drew attention to "the maladjustment" of the Louisiana Civil Code to contemporary social conditions in the United States. His remarks were not directed at the Civil Code of Lower Canada, but they may be extended to that legislation as well. Morrison found that as a matter of the presuppositions of its redactor and enactors, the Code was based upon a philosophy of *laissez faire*; it postulated an economy primarily agricultural and domestic, with wealth expressed in immovables and the population centered in rural areas; and it envisioned the family organized around the concept of *patria potestas* with marital power vested in the husband.[23] Morrison found twentieth century realities to be radically different.[24] Modern society involved increasing acceptance of government intervention, an industrial economy based

20. Franz Bydlinski, *Civil Law Codification and Special Legislation*, *in* QUESTIONS OF CIVIL LAW CODIFICATION 25, 28 (Attila Harmathy & Agnes Németh eds., 1990).

21. *Id.*

22. James J. Morrison, *The Need For a Revision of the Louisiana Civil Code*, 11 TUL. L. REV. 213 (1937).

23. *Id.* at 218-19.

24. *Id.* at 219-20.

upon mass production and the expansion of credit with wealth expressed primarily in movables and intangibles, and the social fabric of the family profoundly changed. Furthermore, there were many new scientific discoveries and new industries based upon them—such as the oil industry, radio and television, and aviation—and these twentieth century creations were without legal foundation in the Civil Code. In short, for him "the entire foundation in the Civil Code is swept from beneath it, leaving the superstructure of its articles suspended *in vacuo* and in contact but remotely and tenuously with the life, the *moeurs* and the demands of civilization."[25]

This description may strike some as exaggerated, and indeed too abstract to serve as a blueprint for revision, but even if we make allowance for political oscillation over the last fifty years, we realize that there is considerable reality to the relevance-gap to which he alludes.

Thus, I conclude to my first question—was revision a pressing need and is it still a pressing need today? Yes, it is more urgent than ever, and indeed we pay a daily price for the delay involved in bringing it about. No, we are not merely programmed to undertake this endeavor. We have solid practical reasons to justify our actions.

Which brings me to my second question, why does revision take so long?

II. THE EXTRA-LENGTHY AND LABORIOUS PROCESS OF RECODIFICATION

There is no single answer to this question. The reasons for an extended delay might be different for example in the Netherlands, where the most extensive preparations and comparative law studies were undertaken preliminary to drafting,[26] whereas in Québec or in Louisiana the reasons may well not be the same. Nevertheless, as a generalization about the timing of recodification efforts, one should note two overriding reasons for delay: the scope or type

25. *Id.* at 218-19.

26. *See* A.S. HARTKAMP, *International Unification and National Codification and Recodification of Civil Law: The Dutch Experience*, *in* QUESTIONS OF CIVIL LAW CODIFICATION 67 (Attila Harmathy & Agnes Németh, eds. 1990). (The explanatory memorandum to the General Part of the title on Obligations, for example, refers in hundreds of notes to the law of forty countries, and not just to legislation but to case law and literature.).

of revision which is attempted and the efficiency of the methods by which it is carried out.

A. The Type of Revision

It is obvious that the type of revision which we undertake may range in difficulty, and it is also obvious that the scope of the task undertaken inherently determines the length of time necessary to complete it. In choosing relatively ambitious goals, both Louisiana and Québec foresaw a lengthy process, though perhaps not as lengthy as events have proved. A mere jurisprudential update of an existing code, for example, is a relatively simple technical task that may be accomplished in a comparatively short period of time.[27] It raises very little political opposition since it is only codifying existing law and not making a change in the law. There is hardly any political reason why it cannot be enacted as a single measure, and no reason to adopt a political strategy of "distract and conquer" by proceeding with a series of piecemeal enactments.

Another type of revision—though perhaps an embarrassing type—may be to adopt *in globo* an up-to-date foreign model. This is certainly inexpensive and technically easy to do, but since it may drastically change both the old law and the tradition linked to that law and thereby invite both professional and political opposition, it may be impossible. Indeed this option, once so widely used in the nineteenth century by newly colonized or decolonized states, has not ever been used, to my knowledge, by any democratic state seeking modernization of its existing code scheme.

This brings us to the third and more ambitious type of revision, the kind I believe that Québec and Louisiana aspire to. This could be called a seminal rethinking or a new synthesis built upon existing foundations. Reaching beyond a mere restatement of the jurisprudence and certainly far different from purchasing a code *prêt à porter* off the rack, this variety of reform code involves a reexamination of all laws, cases, and texts with a view to rendering a modern and coherent code. It will involve scrutiny of special legislation to assess the extent to which it should or can be brought within the code system. It involves improving the text by pruning

27. Such a "revision" *projet* was once accomplished in two years (1908-1910) by a three-member team appointed by the Louisiana Legislature. The *projet* passed to its third reading in the legislature before it was rejected upon the urging of the Louisiana Bar Association. Morrison, *supra* note 22, at 228-29.

archaic and anachronistic features, the study of foreign laws for selective borrowing of workable rules, the summary of certain doctrine and case law, and a due regard for the balance between generality and specificity. It involves restructuring the frameworks of the family, heirship and neighborhood, crystallizing our values about competition and good faith in our obligations, all of these in times which are particularly difficult eras of vacillation between conservative and liberal solutions. This sort of revision should be both politically and technically difficult; it understandably takes additional time and has accounted in some part for the slow progress that we have experienced.

B. The Method of Revision

The method of modern revision is mostly responsible for the severe delay that we have experienced. First, (and speaking here only of the Louisiana experience) there is apparently a political judgment that a slow incremental approach will ensure passage of the drafts through the legislature without its being cut up into fine pieces by legislators and special interests. The strategy is to avoid "politics" and to obtain the approval of the legislature without an infusion of its policy. Therefore, the Revision is presented in bite-size morsels along a separate track bearing the rubric "Law Institute Bill." The legislature is continually reassured by the official comments that the vast majority of the revised articles "do not change the law," though of course this is a disguise. The changes are extensive. Indeed, if it were really true, as often as claimed, that the Revision produced so little legal change, then recodification would seem to have been either poorly executed, or unnecessary in the first place.[28] Indeed, disguise and incrementalism may be seen as necessary tactics in an overall strategy to make legal reform "legislature-proof."

Second, decentralized research and drafting have bred delay. Neither Louisiana nor Québec confided the task of writing a *projet*

28. This legislative strategy has been called "routine policy making" which permits controversial legislation to pass through legislatures without scrutiny or consensus. *See* HERBERT JACOB, THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 167 (1988) ("[T]he proponents . . . usually sought to portray their schemes as a mere updating to match existing practice. It was important to them to claim that the bills they were advocating were compatible with the law already on the books or with the law in action. That assertion reduced the perceived risk in adopting the new laws.").

to a single expert redactor or to a small committee of experts. History and experience teach that the efforts of one extraordinary mind, or a few of them, are always more efficient than those of a large and diverse council or commission.

The Louisiana system is decentralized, two-tiered, and piecemeal. For purposes of illustration, a block of code material, such as the Preliminary Title, or the law of Suretyship, may be confided to a single Reporter (often an academic at one of the state's four law schools) assisted by a research assistant. The Reporter's initial drafts are presented for discussion and amendment to a small committee of perhaps five to ten members (often members of the Council of the Law Institute). The Reporter and his committee usually meet on a monthly basis. A single *projet* of this kind may require several years to complete. Perhaps as many as five or six such Reporters and committees may be concurrently working on various parts of the Civil Code. When a particular Reporter and his committee are satisfied with their final draft, they must ask to present it to the Council of the Law Institute. The Council meets in New Orleans for a day and a half nine times per year. No draft is ever considered final until it is fully approved by the Council, a body composed of ninety-three members. Though several Reporters may have their drafts ready for presentation, each must be discussed and debated *seriatim*, article by article, by the Council sitting as a committee of the whole. The drafts must pass through the Council bottleneck before they may be presented as Bills to the legislature. Unfortunately, the Council schedule permits no more than seventy-two hours per year to be devoted to these deliberations.

This decentralized system of mini-*projets* drafted by Reporters and homologated by a Council reminds one of a congested airport with one runway and a control tower open a few days per year. This system has been criticized (even by insiders) but the Council has refused to open more runways or to relinquish tight control. It is not difficult to understand why this procedure will take us well into the twenty-first century. If it is not changed, the revision of the Civil Code threatens to become a never-ending procedure, like the painter on the Brooklyn Bridge who must start all over again the moment he reaches the other end.

A problem contributing to the delay (and the consistency of the Revision) is the lack of advance policy setting by the Council. The Council has left the initiative to the Reporters and their small committees to judge how the Code should be changed, in accordance with their vision or conception of the proper interface between competing policies, such as consumerism versus freedom of contract or fault versus no fault liability. The Council does not set out in advance any policy regarding the principles, philosophy, or rules to be contained in the Revision. It nevertheless imposes its policy when it reacts to, amends, or rejects a Reporter's *projet*. What the Reporter and committee may believe is rational and proper reform of the Civil Code may turn out to be unacceptable to the Council's taste. Fully drafted *projets* have been permanently shelved after impasses over policy developed before the Council.

Québec is certainly no stranger to the delays caused by disagreements and confusion over policy. The *projet* of 1991 seems to be a fundamental rewrite of the *projet* of 1977. If we glance at a few key elements in the field of obligations, these changes become striking. The 1977 *projet* expanded and generalized the notion of lesion and recognized a separate principle of unconscionability.[29] The 1991 *projet*, however, suppressed the unconscionability provision and restricted lesion to cases specifically provided by law.[30] The 1977 draft suppressed the concept of causa as a formal element of obligations,[31] but the present draft resurrects this traditional notion.[32] The earlier *projet* adopted the doctrine of *imprévision* which would have authorized the courts to review any contract whose execution would cause undue prejudice to one of the parties. The 1991 *projet*, however, appears to have rejected this doctrine in favor of the traditional approach that courts have no equitable power to revise harsh contracts.[33] Extrapolating from the policy of consumer protection, the first draft stated the broad proposition that an abusive clause in a contract may be annulled or reduced.[34] The present draft, however, would only authorize annulment of such clauses when they appear in consumer contracts and

29. The drafters argued that these changes were called for in today's society, given the importance of contracts of adhesion, and governmental concern to protect weak and disadvantaged persons. REPORT ON THE QUÉBEC CODE CIVIL 553 (1977) [hereinafter REPORT].

30. QUEBEC CODE CIVIL (projet) art. 1402 (Can.) (1991).

31. REPORT, *supra* note 29, at 554.

32. QUEBEC CODE CIVIL (projet) arts. 1368, 1406-07 (Can.) (1991).

33. *See* QUEBEC CODE CIVIL (projet) art. 1435 (Can.) (1991) ("A contract cannot be resolved, resiliated, modified or revoked except on grounds recognized by law or agreement of the parties.")

34. QUEBEC CODE CIVIL art. 76. *See* REPORT, *supra* note 29, at 562.

contracts of adhesion.[35] The first *projet* decided against using the traditional notions of fault, causation, and damage in the general tort provision, and wrote instead: "Every person capable of discernment must behave towards others with the prudence and diligence of a reasonable person."[36] The present *projet* restores these classic elements in the general provision.[37]

All of these vacillations suggest the perils of the isolated drafter operating in an era of transition, such as the second half of the twentieth century. It is already difficult to find and strike the right policy since no general consensus may exist or the consensus may be in the process of changing. Operating without policy direction from above or below is like asking a blind-folded Portalis to draft the Code Civil, without informing him of Napoléon's wishes, or that the French Revolution had occurred. Modern social conditions make advance policy consultation, consensus building and planning—prior to drafting—more essential than ever. Policy groping rather than policy planning has caused false starts and has held up the process of recodification in both Québec and Louisiana.

III. COHERENCE AND COMPLETENESS: THE QUALITIES EXPECTED OF THE FINAL PRODUCT

I have dwelt upon the question of a timing in the previous section but now I wish to dismiss what I have said by suggesting that an excellent code is always worth waiting for, no matter the period of time. "All's well that ends well." Whether the final product is a good code or a poor code, the timing is always secondary. Surely efficiency and speed are misspent virtues if the final product is a poor code or no code at all. Thus, I come to my third and final question which deals with the merits of the Revision. Have our efforts produced results that satisfy our legal needs and expectations as well as the criteria which define a code?

In this section I must confine my comments mainly to the revision of the Louisiana Civil Code, with which I am more familiar. I have studied parts of the Québec *projet* of 1991, but I have not analyzed it sufficiently as a whole to venture an overall opinion. Indeed, Québec has just entered into a period of critical reflection,

35. QUEBEC CODE CIVIL (projet) art. 1433 (Can.) (1991). *See also* arts. 1431, 1432.
36. OBLIGATIONS art. 94 (projet) (1977).
37. QUEBEC CODE CIVIL (projet) art. 1453 (Can.) (1991).

dialogue, study, and professional scrutiny of its new creation, and I fully support what my colleague Judge Jean-Louis Baudouin has written in a recent article in the Tulane Civil Law Forum about the role of constructive criticism.[38]

In an article published several years ago, I argued with pessimistic conviction that the revision of the Louisiana Civil Code is producing a fundamentally different kind of codification than we have had in the past. My article was entitled *The Death of a Code—The Birth of a Digest.*[39] In this paper I would add several new points to that analysis, but first I might give a capsule version of the reasoning of that earlier article. My article argued that the Civil Code could no longer be considered a code in the proper sense of the word. A Civil Code in the French sense of the term must be internally coherent (that is, free of inner contradictions) and complete in its field (that is, govern entirely the areas covered). These qualities, I believe, have been lost because of the following characteristics of the Revision.

A. A Refusal to Break with the Past Code and the Past Jurisprudence

The drafters have refused to make an express repeal of the 1870 Code provisions. This marks the first time in Louisiana history that any code replacing a former code has not expressly repealed the latter.[40] Our own laws on repeal and our own historic

38. *Reflections on the Process of Recodification of the Civil Code*, 7 TUL. CIV. L. F. 131 (1992).

> Thus the time hardly seems right to cast doubt on the recodification of our law. The process is well underway and is entering into its final stage. Rather, the time is right for dialogue and the combination of the efforts of all the elements of the legal community: lawyers, notaries, professors and judges. Such dialogue certainly does not mean the disappearance of critical contributions with respect to the proposed reform. On the contrary, criticism, when it is enlightened, is fundamentally healthy and stimulates ideas, allows errors to be corrected and also assures that the ideology behind rules is one that is democratically expressed.

39. Vernon V. Palmer, *The Death of a Code, The Birth of a Digest*, 63 TUL. L. REV. 221 (1988).

40. It can be said with the exception of the present Revision that "repeal by omission [or by implication] has never been practiced before by the Louisiana Legislature in the revision of any code, whether it be the Civil Code, the Criminal Code, the Code of Civil Procedure, or the Revised Statutes of 1950." Palmer, *supra* note 39, at 242. For the express repeal of all civil law in force prior to the 1870 Revision of the Civil Code, see LA. REV. STAT. ANN. § 412 (1870) (All Civil Laws in force before the 1870 promulgation of the Civil Code are "hereby abrogated.").

controversies tell us what effects unrepealed laws have—they remain in vigor and they coexist or co-govern to the extent that they do not contradict the new law.

This refusal to break clearly with the 1870 Code and its jurisprudential gloss has deeply affected the way in which the Code has been drafted. The new Code is structurally compromised by a dependence upon the old law and cases.

B. Predesigned Gaps

The new articles have often been drafted in asymmetrical form with free use of lacunae—predesigned gaps—that the drafters intend will be filled by recourse to the old jurisprudence. The old jurisprudential gloss is intended to be law, even though it has no written form and has not passed before the Legislature. For the drafters, the old jurisprudence is now to be treated as a new common law (or a new "natural law") that surrounds the new articles and fills their gaps. One does not have to read the drafters' minds to know this. One has only to read their Comments which explicitly tell us that that is the way they want us to interpret the emerging Code.

C. Instrumentalist Comments

These Comments are of a kind that I have never seen before. They play an expanded instrumentalist role in the Revision, picking and choosing between the coexisting laws, announcing when old Code articles have been abandoned and declaring when an old gloss has been retained.

D. Methodology of a Digest

This, I believe, is the methodology of a digest as I understand the meaning of that word, or the methodology of a very old code, not a freshly revised one, or perhaps the methodology of a decodified system of civil law. Under the methodology of a digest, one is never sure that the Code itself is a controlling text. One must read the Comments in order to find the veritable sources that govern the text's scope, application, and interpretation. The structure of the revised Code is troubling on other grounds as well.

E. An Uneven Revision

Due to the system of decentralized drafting, the overall level of the revision effort is uneven. The stylistic unevenness is easily demonstrated and has received criticism from others, but the more serious aspect is that the substantive level of the revision varies from segment to segment. It varies in the degree to which special legislation has been absorbed, the degree to which foreign codes (and which of these codes) were influential in the drafting, and the degree to which the Reporter went beyond a mere jurisprudential update. The various parts of the Revision unfortunately display a character and variety of their own, and consequently from the standpoint of mission objectives—certainty, justice, and modernity—they have fulfilled them in unequal degrees.

IV. CONCLUSION

On this inexhaustible subject, there is no conclusion possible. But I am reminded of what Napoléon is reported to have said when he heard that the first commentary had been written on his CODE CIVIL. *"Mon Dieu, mon code est perdu."* But Napoléon was wrong. His code has lived as his greatest achievement precisely because of that remarkable collaboration between legislators, judges, lawyers, doctrinal writers, reformers, and, yes, many "unknown redactors." Without that collaboration—which your diverse presence here in New Orleans is but sign and symbol—codes become empty vessels, dead wood, icons to be worshipped but never examined. Today's reforms bring strength to our systems and much hope for the future of the civil law in Québec and Louisiana.